

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

BRIAN P HATCHER
Claimant

APPEAL NO. 14A-UI-11154-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WRIGHT OUTDOOR SOLUTIONS INC
Employer

OC: 09/21/14
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 15, 2014, reference 03, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that they claimant had been discharged on September 22, 2014, for no disqualifying reason. After due notice was issued, a hearing was held on November 17, 2014. Claimant Brian Hatcher did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Diana Perry-Lehr of Employers Unity represented the employer and presented testimony through Melissa Silvia and Brian Edgar. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials.

On November 18, 2014, the day after the appeal hearing, Mr. Hatcher contacted the Appeals Section with regard to the hearing he had missed on November 17, 2014. Mr. Hatcher confirmed that he had received proper notice of the hearing, but had not read and followed the hearing notice instructions to provide a telephone number for the hearing. The administrative law judge concluded, pursuant to Iowa Administrative Code rule 871-26.14(7)(c), that Mr. Hatcher did not provide good cause to re-open the hearing record.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Wright Outdoor Solutions, Inc., provides customers with chemical treatment of trees and lawns. Brian Hatcher was employed by Wright Outdoor Solutions as a full-time, seasonal Plant Health Care Applicator from April 7, 2014 until September 22, 2014, when Brian Edgar, Seasonal Service Manager, discharged him from the employment. Mr. Edgar started his employment about five weeks after Mr. Hatcher started and had not been involved with hiring or training Mr. Hatcher. The employer had Mr. Hatcher perform chemical application services unsupervised, though Mr. Hatcher lacked the applicator's license required to work unsupervised.

Between September 4 and 11, 2014, Mr. Hatcher applied turf chemicals to several lawns. Beginning on September 16, 2014, the employer began receiving complaints from concerned customers about lawn damage caused by the chemical application. The damage to the lawns exposed the employer to substantial liability for repair and/or replacement of the lawns. When questioned about the matter as part of the employer's investigation, Mr. Hatcher told Mr. Edgar which piece of equipment he had used for the lawn treatments. Mr. Hatcher told the employer he believed the damage was nitrogen burn caused by overspreading of nitrogen. In other words, under Mr. Hatcher's theory, he had incorrectly calibrated the amount of nitrogen to be spread on the lawns. Mr. Edgar initially shared that opinion, but later concluded that Mr. Hatcher had used a different sprayer and had failed to properly clear Roundup herbicide from that tank before he used the tank sprayer on the lawns in question. Mr. Edgar based his eventual conclusion on the spray pattern the damage to the lawn reflected and on his erroneous belief that Roundup does not kill dandelions. Mr. Hatcher had last used the tank sprayer containing Roundup in June or July. The employer's protocol for clearing a tank after a chemical application was to rinse the tank with water three times.

In making the decision to discharge Mr. Hatcher from the employment, Mr. Edgar also considered a number of prior incidents. On May 16, Mr. Hatcher had backed into a mailbox post while backing out of a driveway. On June 16, Mr. Hatcher backed into another mailbox. On August 29, Mr. Hatcher backed a trailer into a rural address post when backing out of a driveway. On June 24, Mr. Hatcher drove a company truck onto a customer's lawn and into the customer's backyard at a time when the ground was wet. Mr. Hatcher had pulled the truck onto the lawn so that he could spray a tree with a truck-mounted tank sprayer. The company truck got stuck in the customer's lawn and Mr. Hatcher caused damage to the customer's lawn while trying to get the truck unstuck. On September 15, Mr. Hatcher had slid into a parked vehicle while operating a ride-on sprayer.

Mr. Hatcher established a claim for unemployment insurance benefits that was effective the week that started September 21, 2014. Mr. Hatcher has so far received \$1,732.00 in benefits for six weeks during the eight-week period of September 21, 2014 through November 15, 2014.

On October 14, 2014, Iowa Workforce Development held a fact-finding interview to address Mr. Hatcher's separation from the employment. Melissa Silvia, Employer's Unity Claim Specialist, represented the employer at the appeal hearing. Ms. Silvia provided a brief oral statement to the claims deputy regarding the lawn damage that triggered the discharge. The employer had also provided a warning letter, a notice of separation, and a termination letter that, if taken together and un rebutted by the claimant, would have been sufficient to establish misconduct in connection with the employment through a pattern of carelessness and/or neglect.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Whether the damage to the lawns occurred through incorrectly measuring the amount of nitrogen to be applied to the lawns or by use of a machine that had not been sufficiently cleaned, the evidence does establish at least carelessness on the part of Mr. Hatcher in connection with the damage to the lawns. Mr. Hatcher's culpability in that matter is mitigated by the employer's decision to allow him to work unsupervised despite his lack of the requisite applicator's license. If the damage to the lawns was the only incident that factored in the discharge, there would likely not be sufficient evidence to establish disqualifying misconduct. However, the employer presented sufficient evidence to establish a pattern of careless and/or negligent operation of the employer's other equipment. That pattern included damage to two mail box posts, a collision with a rural address marker, damage to a customer's yard through a decision to drive a truck onto wet soil and efforts to get the truck unstuck, and most recently, damage to a customer's parked vehicle. That pattern was sufficient to establish misconduct in connection with the employment. Accordingly, Mr. Hatcher is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$1,732.00 in benefits for six weeks during the eight-week period of September 21, 2014 through November 15, 2014. Because the employer participated in the fact-finding interview within the meaning of the law, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The October 15, 2014, reference 03, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$1,732.00 in benefits for six weeks during the eight-week period of September 21, 2014 through November 15, 2014. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs